Nos. 19-55526, 19-55707, 19-55708, 19-55718, 19-55725, 19-55727, 19-55728

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ENVIRONMENTAL DEFENSE CENTER; SANTA BARBARA CHANNELKEEPER; PEOPLE OF THE STATE OF CALIFORNIA; CALIFORNIA COASTAL COMMISSION; CENTER FOR BIOLOGICAL DIVERSITY; AND WISHTOYO FOUNDATION,
Plaintiffs/Appellees/Cross-Appellants,

v.

BUREAU OF OCEAN ENERGY MANAGEMENT, et al.,
Defendants/Appellants/Cross-Appellees,

and

AMERICAN PETROLEUM INSTITUTE, et al.,
Intervenor-Defendants/Appellants/Cross-Appellees.

On Appeal from the United States District Court
for the Central District of California
Nos. 2:16-cv-08418, 2:16-cv-08473, 2:16-cv-09352 (Hon. Philip S. Gutierrez)

STATE APPELLEES' PRINCIPAL AND RESPONSE BRIEF ON CROSS-APPEAL

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INTRODUCTION

In May 2016, two agencies within the United States Department of the Interior, the Bureau of Safety and Environmental Enforcement and the Bureau of Ocean Energy Management (collectively, "Interior"), issued a final environmental assessment and decision to allow well stimulation treatments ("WSTs"), including hydraulic fracturing and acidizing, for oil and gas development off the coast of Southern California (the "Proposed Action"). This assessment was the first time that Interior had ever reviewed the impacts of WSTs on these federal waters, known as the Pacific Outer Continental Shelf ("Pacific OCS").

Despite substantial evidence showing the potential for significant environmental effects, including the discharge of toxic chemicals into the marine environment and prolonging the life of aging offshore infrastructure, Interior improperly concluded that allowing these activities would result in no significant effects. In doing so, Interior relied on unfounded assumptions and uncertainty, rather than taking a "hard look" at these impacts, in violation of the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 *et seq.* Interior also violated NEPA by defining the statement of purpose and need in unreasonably narrow terms and by failing to consider reasonable alternatives to its Proposed Action. The district court ignored the clear precedent of this Court in finding that

Interior's assessment complied with NEPA, and its grant of judgment in favor of Interior should be reversed.

Interior also violated the Coastal Zone Management Act ("CZMA"), 16 U.S.C. § 1451 *et seq.*, by failing to determine whether allowing the use of WSTs is consistent to the maximum extent practicable with the enforceable policies of California's coastal management program. As the record demonstrates, these activities are likely to affect resources protected by California's policies safeguarding marine species and the quality of coastal waters, as well as preventing spills of oil and hazardous substances. The district court properly found for California on this issue, and its grant of judgment and issuance of a permanent injunction for this violation should be affirmed.

STATEMENT OF JURISDICTION

California adopts the Statement of Jurisdiction submitted by the American Petroleum Institute.

STATEMENT OF ISSUES PRESENTED

1. Was Interior's issuance of a Final Programmatic Environmental Assessment and Finding of No Significant Impact a final agency action under the Administrative Procedure Act ("APA"), 5 U.S.C. § 551 *et seq.,* that was ripe for judicial review?

2. Did the district court err when it held that Interior took a hard look at the impacts of WSTs on the Pacific OCS, despite its reliance on unfounded assumptions, non-NEPA documents, and a lack of information in reaching its conclusions?

3. Did the district court err in upholding Interior's statement of purpose and need, even though it was the same as the Proposed Action and constrained the consideration of alternatives?

4. Did the district court err in upholding Interior's alternatives analysis, notwithstanding the lack of any meaningful difference between the action alternatives and its failure to consider reasonable alternatives suggested by commenters?

5. Did the district court correctly hold that 16 U.S.C. section 1456(c)(1) of the CZMA requires Interior to prepare a consistency determination for the Proposed Action?

6. Did the district court abuse its discretion by issuing an injunction prohibiting Interior from approving any plans or permits submitted by operators for the use of WSTs on the Pacific OCS unless and until Interior completes the CZMA process under 16 U.S.C. section 1456(c)(1) for the Proposed Action?

7. Did the district court abuse its discretion by denying Intervenor-Defendant DCOR, LLC's ("DCOR") motion for reconsideration?

STATUTORY ADDENDUM

All relevant statutes, regulations, and legislative history are set forth in an addendum to this brief.

STATEMENT OF THE CASE

I. FACTUAL BACKGROUND.

In late 2014 and early 2015, the Environmental Defense Center and Center for Biological Diversity (collectively, the "Conservation Group Plaintiffs") filed separate lawsuits against Interior for authorizing WSTs on the Pacific OCS without any evaluation of environmental impacts under NEPA or a consistency determination under the CZMA. ER 11. On January 29, 2016, the parties entered into a settlement agreement which required Interior to develop a Programmatic Environmental Assessment ("PEA") under NEPA by May 28, 2016. SER 555-64. The purpose of the PEA was to determine whether an environmental impact statement ("EIS") or a Finding of No Significant Impact ("FONSI") would be appropriate. SER 557. Prior to completion of the Final PEA, Interior agreed to withhold all approvals of WSTs on the Pacific OCS. SER 557-58.

Interior issued a draft PEA on February 22, 2016, which purported to evaluate the impacts of WSTs at 22 production platforms located on 43 active leases off the coast of Southern California. SER 544-46. According to the draft PEA, "[t]he purpose of the proposed action is to allow the use of certain WSTs (e.g., hydraulic

fracturing) in support of oil production at platforms on the Pacific OCS." SER 546. Having defined the purpose with a single outcome in mind—"allowing the use of certain WSTs"— Interior then set forth four alternatives, the first three of which would allow the use of WSTs at all 22 production platforms, without any limit on the number of hydraulic fracturing or acidizing operations. SER 547-53. The fourth option, the "no project" alternative, would not allow any use of WSTs. *Id.* The draft PEA found that the Proposed Action would not result in any significant impacts. SER 554.

During the 30-day comment period, Interior received comments from 22 governmental agencies, 102 non-governmental organizations, and thousands of individuals. ER 1434. Two California state agencies—the California Coastal Commission ("Coastal Commission") and the Division of Oil, Gas, and Geothermal Resources ("DOGGR")—submitted comments that questioned the unfounded assumptions and lack of analysis in the draft PEA, suggested additional alternatives for consideration, and recommended consultation with California under the CZMA. SER 299-301, 526-39. In addition, the U.S. Environmental Protection Agency ("EPA"), as well as members of the California Legislature and U.S. Congress, submitted comments that were critical of the draft PEA, citing in particular the lack of information or analysis to support its findings. SER 144-46, 149-54, 523-25.

Interior issued the Final PEA on May 27, 2016. ER 1181. The Final PEA tweaked the punctuation and a few words of the statement of purpose and need without substantively altering its narrow objective. ER 1217 ("[t]he purpose of the proposed action (use of certain WSTs, such as hydraulic fracturing) is to enhance the recovery of petroleum and gas from new and existing wells on the P[acific] OCS, beyond that which could be recovered with conventional methods (i.e., without the use of WSTs)."). After examining the same four alternatives as the draft PEA (ER 1223-30), Interior concluded that the Proposed Action would not result in any significant impacts. ER 1212-14, 1419.

Also on May 27, 2016, Interior issued a FONSI providing their "determination that the Proposed Action would not cause any significant impacts," and that "implementing the Proposed Action does not constitute a major federal action significantly affecting the quality of the human environment within the meaning of Section 102(2)(c)" of NEPA. ER 1172, 1179. In choosing to implement the Proposed Action, Interior decided not to move forward with any of the three alternatives, including the No Action Alternative, which would have prohibited the use of WSTs on the Pacific OCS and "eliminate[d] all effects of the use of WSTs." ER 1176.

II. PROCEDURAL HISTORY.

In November and December 2016, California and the Conservation Group Plaintiffs filed actions challenging the Final PEA and FONSI in the Central District of California. ER 1007, 1033, 1067. In addition to the NEPA claims brought by all three groups of plaintiffs, California alleged that Interior violated the CZMA by failing to prepare a consistency determination, while the Conservation Group Plaintiffs pleaded claims under the Endangered Species Act ("ESA"), 16 U.S.C. § 1531 *et seq.*, based on Interior's failure to consult with the appropriate federal wildlife agencies regarding impacts to listed species and critical habitat. The three cases were consolidated in February 2017. ER 92-93. Intervenor-Defendants American Petroleum Institute ("API"), ExxonMobil ("Exxon"), and DCOR intervened on the side of Interior.

Interior filed a motion to dismiss, arguing that the Final PEA and FONSI were neither "agency action" nor "final agency action" subject to review under the APA. In July 2017, the district court denied this motion in its entirety, finding that the Final PEA and FONSI were "agency action" as defined by the APA, as well as "final agency action" subject to judicial review, as this Court has "repeatedly held." ER 77-91.

The parties then filed cross-motions for summary judgment, which the district court granted in part and denied in part in November 2018. ER 10-50. The district

court (1) denied California's and the Conservation Group Plaintiffs' motions on their NEPA claims; (2) granted California's motion on its CZMA claim; and (3) granted the Conservation Group Plaintiffs' motions on their ESA claims regarding failure to consult with the U.S. Fish and Wildlife Service ("FWS"), while finding that the ESA claims regarding failure to consult with the National Marine Fisheries Service ("NMFS") were moot. *Id.*

On December 13, 2019, the district court issued a final judgment ordering Interior to refrain from approving any plans or permits by operators for the use of WSTs on the Pacific OCS unless and until it (1) completes consultation with FWS under the ESA, and (2) completes the CZMA process under 16 U.S.C. § 1456(c)(1) for the Proposed Action. ER 7-9.

On January 10, 2019, DCOR filed a motion for partial amendment of judgment or partial relief from order, requesting that the district court allow Interior to approve permits that would enable DCOR to conduct hydraulic fracturing on two offshore wells. ER 129-152. Following briefing by the parties, the district court denied this motion on April 23, 2019. ER 1-6. The parties timely appealed to this Court. ER 94-128.

SUMMARY OF ARGUMENT

1. With regard to the jurisdictional issues raised by Interior, the district court had subject matter jurisdiction to decide this case. The U.S. Supreme Court

and this Court have repeatedly held that final NEPA documents constitute final agency action under the APA and are ripe for judicial review.

2. On the merits of California's NEPA claims, the district court erred by disregarding the well-established precedent of this Court in finding that Interior took the required "hard look" at impacts given its reliance on unfounded assumptions, non-NEPA documents, and uncertainty. The district court also accepted Interior's unreasonably narrow statement of purpose and need and alternatives analysis based on the erroneous findings that a prior settlement agreement required this approach and that all reasonable alternatives were addressed.

3. With regard to California's CZMA claims, the district court properly held that Interior's decision to allow WSTs will have reasonably foreseeable coastal effects, and that Interior violated the CZMA by failing to submit a consistency determination to the Coastal Commission and completing the CZMA review process. The district court did not abuse its discretion in enjoining Interior from allowing WSTs on the Pacific OCS unless and until Interior completes this process.

4. Finally, the district court did not abuse its discretion in denying DCOR's motion for reconsideration. The district court applied the appropriate standards

and properly balanced the harms in issuing a permanent injunction based on Interior's violations of the CZMA and the ESA.

STANDARD OF REVIEW

This Court reviews de novo a district court's rulings granting or denying a motion to dismiss and cross-motions for summary judgment. *DaVinci Aircraft, Inc. v. United States*, 926 F.3d 1117, 1122 (9th Cir. 2019); *Def. of Wildlife v. Zinke*, 856 F.3d 1248, 1256 (9th Cir. 2017). The Court reviews the district court's decision to grant a permanent injunction for abuse of discretion. *Edmo v. Corizon, Inc.* 935 F.3d 757, 784 (9th Cir. 2019); *United States v. Washington*, 853 F.3d 946, 962 (9th Cir. 2017). The Court reviews the denial of a motion for reconsideration for abuse of discretion. *Kerr v. Jewell*, 836 F.3d 1048, 1053 (9th Cir. 2016).

ARGUMENT

I. THE DISTRICT COURT HAD SUBJECT MATTER JURISDICTION TO DECIDE THIS MATTER.

The district court correctly concluded that Interior's issuance of the Final PEA and FONSI constituted final agency action subject to judicial review under the APA.[1] The U.S. Supreme Court and this Court have repeatedly held that final NEPA documents, including programmatic EAs and FONSIs, constitute final agency actions that can be immediately challenged to allege procedural injuries

[1] In the proceedings below, Interior did not allege that California's claims were unripe.

such as those claimed by California in this matter. Consequently, Interior's arguments must be rejected.

A. Interior's Issuance of the Final PEA and FONSI Constituted Final Agency Action.

There is no merit to Interior's claim that the Final PEA and FONSI were merely a "preliminary" analysis that did not constitute a final agency action. *See* Interior Br. at 3, 10, 12. As the U.S. Supreme Court has stated, two conditions must be satisfied for an agency action to be "final": "First, the action must mark the consummation of the agency's decisionmaking process—it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which 'rights or obligations have been determined,' or from which 'legal consequences will flow.'" *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997) (citations omitted). Both of these conditions are easily met here.

First, the Final PEA and FONSI marked the conclusion of Interior's review process for purposes of NEPA. There is nothing in the Final PEA or FONSI suggesting that these documents were "preliminary." The FONSI explicitly provides Interior's final determination under NEPA "that the Proposed Action would not cause any significant impacts," and is signed by Interior officials. ER 1179; *see Te-Moak Tribe of Western Shoshone of Nevada v. U.S. Dep't of Interior*, 608 F.3d 592, 598 (9th Cir. 2010) ("Here, we review the modified DR/FONSI

issued by [Bureau of Land Management ("BLM")] State Director, which is the final agency action"); *Malama Makua v. Rumsfeld*, 136 F. Supp. 2d 1155, 1161-62 (D. Haw. 2001) (rejecting defendants' contention that an EA/FONSI were "only preliminary or tentative decisions" or "draft documents," given that "the words 'draft,' 'tentative,' or 'preliminary' do not appear anywhere in the [EA] or FONSI" and the FONSI was signed and dated by an official representing defendants).

The same is true for the CZMA, inasmuch that Interior concluded in the FONSI that the Proposed Action does not "threaten[] a violation" of any federal or state environmental laws, and Interior has not engaged in CZMA consistency review for the Proposed Action. ER 1179; *see* 5 U.S.C. § 551(13) ("agency action" includes the "failure to act"); *California v. Norton*, 311 F.3d 1162, 1175 (9th Cir. 2002) (reviewing agency's failure to submit a CZMA consistency determination for lease suspensions); Argument V, *infra* (explaining that a CZMA consistency determination is required for the Proposed Action).

Second, Interior's issuance of the Final PEA and FONSI constituted an action by which rights or obligations were determined and from which legal consequences flow. Specifically, Interior determined that implementation of the Proposed Action to allow WSTs in the Pacific OCS would have no significant impacts, and no EIS would be prepared. *See* ER 1179; *Hall v. Norton*, 266 F.3d 969, 975 n.5 (9th Cir. 2001) (BLM's issuance of FONSI and "decision not to

prepare an EIS is a final agency action"). Interior declined to implement the No Action Alternative that would have prohibited the use of WSTs, or to implement alternatives that would have required additional mitigation measures.

The findings in the Final PEA and FONSI impact Interior's future review of site-specific decisions and actions. As Interior admits, the Final PEA will inform future agency decisions and, in fact, Interior may do no further NEPA review of site-specific WSTs based on the Final PEA itself. *See* Interior Br. at 20; ER 18-19, 35-36, 45-46, 86. Moreover, Interior's issuance of the Final PEA and FONSI ended the moratorium on offshore WSTs. *See Malama Makua*, 136 F. Supp. 2d at 1163 (issuance of EA and FONSI triggered significant legal consequences because it authorized resumption of military training).

All of these facts demonstrate that Interior approved the Proposed Action through the FONSI and plans to allow the use of WSTs in the Pacific OCS, as it has done many times in the past. *See Citizens Ass'n of Georgetown v. Fed. Aviation Admin.*, 896 F.3d 425, 432-33 (D.C. Cir. 2018) (holding FONSI constituted FAA's final order approving departure procedures); *Ocean Mammal Institute v. Gates*, 546 F. Supp. 2d 960, 981 (D. Haw. 2008).

Courts in the Ninth Circuit have repeatedly and consistently found that the issuance of final NEPA documents, including programmatic EAs and EISs, are final agency actions that can be immediately challenged. *See, e.g., Oregon Natural*

Desert Ass'n v. Bureau of Land Mgmt., 625 F.3d 1092, 1118-19 (9th Cir. 2010) ("Once an EIS's analysis has been solidified in a ROD, an agency has taken final agency action, reviewable under § 706(2)(A)") (citing 40 C.F.R. § 1505.2(a) and collecting cases); *Te-Moak Tribe of Western Shoshone of Nevada*, 608 F.3d at 598; *Kern v. U.S. Bureau of Land Mgmt.*, 284 F.3d 1062, 1070 (9th Cir. 2002) ("Because the plaintiffs here bring a NEPA challenge to an EIS ... , they are able to show an imminence of harm to the plaintiffs and a completeness of action by the agency"); *Chilkat Indian Village of Klukwan v. Bureau of Land Mgmt.*, 399 F. Supp. 3d 888, 909 (D. Alaska 2019) ("it is undisputed that [EA and FONSI] constituted a final agency action within the meaning of the APA"). The same is true for procedural violations of the CZMA. *See Ocean Mammal Institute*, 546 F. Supp. 2d at 980-81. In fact, California is not aware of any case where a court found that the issuance of a final EA and FONSI did not constitute "final agency action" for APA purposes, and Interior cites none.

Interior's primary argument is that final agency action has not occurred because it did not authorize the use of any specific WSTs. Interior Br. at 13-14, 16-17, 19. However, California is not challenging the issuance of site-specific permits. Rather, California is challenging Interior's compliance with the procedures specified by NEPA and the CZMA for the Proposed Action, *i.e.* to allow WSTs in the Pacific OCS. *See Inland Empire Pub. Lands Council v. U.S.*

Forest Serv., 88 F.3d 754, 758 (9th Cir. 1996) ("NEPA exists to ensure a process, not to ensure any result."); *State of Cal. By and Through California Coastal Comm'n v. Mack*, 693 F. Supp. 821, 822-23 (N.D. Cal. 1988) (consistency determination process is a procedural requirement of the CZMA). The fact that Interior is not currently considering any WST applications (Interior Br. at 12) is of no consequence; the procedural injuries alleged by California have already occurred and do not depend on the issuance of future permits. *See* Argument I.B, *infra*.

Interior's other arguments similarly lack merit. First, the "Proposed Action" as described in the Final PEA is not that Interior would merely "continue to review applications" for well stimulation permits. Interior Br. at 13. Rather, under its "Proposed Action –Allow Use of WSTs" (Alternative 1), Interior would "approve the use of" WSTs on the Pacific OCS as long as they were "deemed compliant with performance standards" in Interior's regulations. ER 1223.

Second, there is no merit to Interior's claim that there is no "final agency action" because it did not issue a record of decision ("ROD"). Interior Br. at 3, 14-15, 23-24. As evidenced by the cases discussed above, federal agencies do not issue a ROD when preparing an EA; rather, the NEPA process typically concludes with the issuance of a FONSI. *See* 40 C.F.R. §§ 1505.2 ("Record of decision in cases requiring environmental impact statements"); 1508.13 (definition of FONSI).

Interior's own NEPA regulations provide for the "[c]onclusion of the environmental assessment process" as follows:

> Upon review of the environmental assessment by the Responsible Official, *the environmental assessment process concludes with* one of the following:
>
> (1) A notice of intent to prepare an environmental impact statement;
>
> (2) *A finding of no significant impact*; or
>
> (3) A result that no further action is taken on the proposal.

43 C.F.R. § 46.325 (emphasis added).

The cases cited by Interior are inapposite. Interior Br. at 15-16. For example, *FTC v. Standard Oil Co.*, 449 U.S. 232, 244-45 (1980) involved the issuance of a complaint by the Federal Trade Commission that has no relevance to the situation here. Similarly inapplicable is the decision in *Public Citizen v. Office of U.S. Trade Representative*, 970 F.2d 916, 918-19 (D.C. Cir. 1992), where the D.C. Circuit found that the negotiation of trade agreement, and a draft agreement, were not "final agency actions" that could trigger NEPA. *Center for Biological Diversity v. U.S. Dep't of Interior*, 563 F.3d 466, 480 (D.C. Cir. 2009) involved a challenge to an offshore leasing program in Alaska, but final agency action was not an issue. Finally, there is no merit to Interior's statement that "[t]he Supreme Court made clear in *Bennett* ... that issuance of an environmental assessment is not a final agency action." Interior Br. at 11. While that case set out the test for

determination of a "final agency action," the Supreme Court did not discuss this standard with regard to NEPA.

B. California's Claims are Ripe for Review.

There is also no merit to Interior's argument that the district court should have dismissed California's claims because they are unripe. Interior Br. at 22-24. As an initial matter, Interior's argument focuses on prudential, not constitutional, ripeness, which is a discretionary consideration of this Court. *See, e.g., Friends of Alaska Nat'l Wildlife Refuges v. Bernhardt*, 381 F. Supp. 3d 1127, 1135-36 (D. Alaska 2019) (finding that "'[p]rudential considerations of ripeness are discretionary'" and "declin[ing] to refuse to adjudicate this case on prudential grounds") (quoting *Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1138 (9th Cir. 2000) (en banc)); *see also Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 167 (2014) (suggesting that once a court "has concluded that [plaintiffs] have alleged a sufficient Article III injury," any prudential ripeness concerns do not render a claim nonjusticiable).[2]

[2] As this Court has found, the constitutional minimum of ripeness "coincides squarely with standing's injury in fact prong," and where a plaintiff's injury in fact signals that a case and controversy exists in satisfaction of Article III, the constitutional requirement of ripeness is also satisfied. *Clark v. City of Seattle*, 899 F.3d 802, 809 (9th Cir. 2018) (quoting *Bishop Paiute Tribe v. Inyo Cty.*, 863 F.3d 1144, 1153 (9th Cir. 2017)). California's standing to bring this action has never been challenged.

Prudential ripeness is designed to "prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies." *Abbott Labs. v. Gardner*, 387 U.S. 136, 148 (1967). In *Ohio Forestry Ass'n v. Sierra Club*, 523 U.S. 726 (1998), the U.S. Supreme Court stated that in evaluating ripeness, a court should evaluate whether: (1) delayed review would cause hardship to the plaintiff; (2) judicial intervention would inappropriately interfere with further administrative action; and (3) the courts would benefit from further factual development of the issues presented. *Id.* at 733. California's claims are ripe under this test.

With regard to hardship, under binding U.S. Supreme Court and Ninth Circuit precedent, California's procedural injuries under NEPA and the CZMA were complete upon Interior's issuance of the Final PEA and FONSI. As the U.S. Supreme Court has stated, "a person with standing who is injured by a failure to comply with the NEPA procedures may complain of that failure at the time the failure takes place, for the claim can never get riper." *Id.* at 737. Delaying judicial review of these procedural claims until some further action, as Interior suggests, would only extend and compound the current harms. *See Wash. Toxics Coal. v. U.S. Dep't of Interior*, 457 F. Supp. 2d 1158, 1174-75 (W.D. Wash. 2006) (finding in case involving procedural injury that "withholding review would exacerbate the hardship that already exists"). In general, "[w]hen a party… suffers a procedural

injury, it 'may complain of that failure at the time the failure takes place,'" and "[t]he imminence of project-specific implementation 'is irrelevant to the ripeness of an action raising a procedural injury.'" *Cottonwood Envtl. Law Ctr. v. U.S. Forest Serv.*, 789 F.3d 1075, 1084 (9th Cir. 2015) (quoting *Ohio Forestry*, 523 U.S. at 737 and *Citizens for Better Forestry v. U.S. Dep't of Agric.*, 341 F.3d 961, 977 (9th Cir. 2003)).

California's claims also are fit for judicial review because they present purely legal issues and do not require further agency refinement or factual development. First, legal claims arising under the APA and based upon an administrative record do not require further factual development before judicial disposition. *See Center for Biological Diversity v. Kempthorne*, 588 F.3d 701, 708 (9th Cir. 2009) ("whether an agency action is arbitrary and capricious is a legal question that would not benefit from further factual development"). As this Court has found, "[b]ecause the alleged procedural violation … is complete, so too is the factual development necessary to adjudicate the case." *Cottonwood Envtl. Law Ctr.*, 789 F.3d at 1084.

Moreover, the Final PEA and FONSI have reached a final administrative resting place, and no further administrative action is necessary for this Court to decide California's legal claims. *See, e.g., Friends of the River v. U.S. Army Corps of Eng'rs*, 870 F. Supp. 2d 966, 980-81 (E.D. Cal. 2012) (citing *Kern*, 284 F.3d at

1071) (adjudicating plaintiffs' NEPA claims now will not "inappropriately interfere with further administrative action" because "Defendants allegedly have already surpassed the stage in which they should have issued" an EIS).

Following this logic, this Court has repeatedly rejected ripeness arguments when plaintiffs allege procedural violations of environmental statutes. *See, e.g., Cal. ex rel. Lockyer v. U.S. Dep't of Agric.*, 575 F.3d 999, 1011 (9th Cir. 2009) (finding matter ripe for adjudication where it would be plaintiffs' only opportunity to challenge a rule on a nationwide, programmatic basis); *Laub v. U.S. Dep't of the Interior*, 342 F.3d 1080, 1088-91 (9th Cir. 2003) (because the chosen alternative "will determine the scope of future site-specific proposals, the defendant's alleged procedural failure to comply with NEPA's requirements is ripe for immediate judicial review."); *Citizens for Better Forestry*, 341 F.3d at 977 (observing that "a NEPA challenge was ripe because the injury occurred when the allegedly inadequate EIS was promulgated"); *Kern*, 284 F.3d at 1070-71 (finding that "[i]f there was an injury under NEPA, it occurred when the allegedly inadequate EIS was promulgated" and rejecting ripeness challenge).

There is no merit to Interior's contention that some future, site-specific permit or action must be approved before the case is ripe for review. *See* Interior Br. at 11, 23. This Court in *Citizens for Better Forestry* specifically rejected this contention, finding that "the imminence or lack thereof of site-specific action is

simply a factual coincidence, rather than a basis for legal distinction .... [T]he planning of site-specific action *vel non* is irrelevant to the ripeness of an action raising a procedural injury." *Id.* at 977-78; *see Idaho Conservation League v. Mumma*, 956 F.2d 1508, 1516 (9th Cir. 1992) (allowing challenge to programmatic EIS and holding that "if the agency action only could be challenged at the site-specific development stage, the underlying programmatic authorization would forever escape review").

II. INTERIOR VIOLATED NEPA BY FAILING TO TAKE A "HARD LOOK" AT THE ENVIRONMENTAL IMPACTS OF ALLOWING WELL STIMULATION TREATMENTS ON THE PACIFIC OUTER CONTINENTAL SHELF.

As this Court has stated, "the fundamental purpose of NEPA ... is to ensure that federal agencies take a 'hard look' at the environmental consequences of their actions ... early enough so that it can serve as an important contribution to the decision making process." *California v. Norton*, 311 F.3d at 1175 (citation omitted). "To take the required 'hard look' at a proposed project's effects, an agency may not rely on incorrect assumptions or data... ." *Native Ecosystems Council v. U.S. Forest Serv.*, 418 F.3d 953, 964 (9th Cir. 2005). An agency cannot excuse itself from conducting the required "hard look" because an activity is conducted pursuant to another permit or because impacts have been discussed in a "non-NEPA document." *South Fork Band Council of Western Shoshone v. U.S. Dep't of Interior*, 588 F.3d 718, 726 (9th Cir. 2009). An agency also cannot rely

on a lack of information about an activity to find its impacts insignificant, rather than doing the necessary work to obtain such knowledge. *Nat'l Parks & Conservation Ass'n v. Babbitt*, 241 F.3d 722, 733 (9th Cir. 2001).

Here, the district court misapplied these standards in finding that Interior took a "hard look" at the impacts of allowing WSTs on the Pacific OCS. First, contrary to the evidence in the record, the district court allowed Interior to rely on the incorrect assumption that such treatments would only occur infrequently in the future, which distorted its consideration of impacts and significance factors. The district court also found it permissible for Interior to assume that compliance with a Clean Water Act permit, and that dilution of toxic chemicals in the ocean, would render any impacts insignificant, without any evidence or analysis to support such an assumption. Finally, the district court improperly permitted Interior to cite the lack of information about the toxicity of WST chemicals to support its findings of insignificance, rather than requiring the agency to obtain the data required to eliminate such uncertainty. Given the clear precedent of this Court, the district court's rulings are in error.

A. Interior Improperly Assumed that Well Stimulation Treatments Would Only Occur Infrequently in the Future.

In conducting its environmental review, Interior assumed that WSTs would occur only infrequently on the Pacific OCS in the future—in particular, that only

five such permits would be approved each year. ER 1175, 1177, 1226. However, this assumption relied upon data that Interior itself admits is anecdotal and unreliable. In fact, the record shows not only that a higher rate of WSTs likely occurred in the past, but that it is reasonably foreseeable that the frequency will increase in the future. Interior compounded this error by relying on this assumption as a basis for concluding, with minimal analysis, that the Proposed Action would not have any significant environmental effects.

With regard to past data, the district court found that the information relied upon by Interior was not "so unreliable that it was arbitrary and capricious for the agencies to base their projections on it." ER 21. Focusing on just one page of the Final PEA, the district court stated that "[t]he information before the agencies indicated that the actual number of WSTs was quite low. Based on that data, since 2000, only six WSTs in total have been approved and implemented on the [Pacific OCS] – an average of less than one every two years." ER 21. As a result, the district court concluded that Interior was "extraordinarily conservative" in its estimate of five WSTs per year.

However, the record does not support these findings. To the contrary, Interior admits that it does not know the true number of WSTs that have occurred on the Pacific OCS in recent years. *See, e.g.*, SER 278, 542. For example, with regard to acidizing, Interior states that it does "not have [a] number between 1984-2011."

SER 542; *see* SER 136 ("Offshore acid treatments appear to be used more frequently than hydraulic fracturing in state and federal waters, but the levels of activity are difficult to quantify from the available records. There are no records of acid fracturing conducted offshore."). Elsewhere, Interior concludes that there is "not enough information" on discharge monitoring reports to determine the number of WSTs that occurred in the past. SER 143. This stems in part from the fact that "[n]o formal data collection system has been set up to track use of well stimulation conducted in federal waters." SER 138.

In addition to citing unreliable data regarding the historical use of WSTs, the district court ignored evidence regarding future treatments in finding that "a significant increase in the use of WSTs on the [Pacific OCS] is unlikely." ER 21. While the district court cited statements in the Final PEA regarding the permeability of offshore oil and gas formations, it disregarded the fact that aging offshore reservoirs are increasingly likely to require these treatments to remain productive. As Interior admits, "[t]he reservoirs associated with the 43 active leases on the [Pacific] OCS have been in production from 26 to 48 years, and reservoir pressures have been gradually declining with this production. The use of WSTs may support the continued recovery of oil and natural gas as primary recovery declines within the active lease area." ER 1218; *see* ER 1417 ("WST use may prolong oil production"). Interior further acknowledges that WSTs will

"allow lessees to recover hydrocarbon resources (*i.e.*, oil) that would otherwise not be recovered from the reservoirs in the 43 lease areas that have been and continue to be accessed by existing wells and any new wells in the foreseeable future." ER 1217. And, Interior notes that "[s]ome operators have had some success increasing hydrocarbon production by performing frac-pacs (a type of hydraulic fracturing) in the sandstone reservoirs of the eastern Santa Barbara Channel." ER 1343.

Similarly, Interior admits that not allowing WSTs could result in "the potential closure of wells that become unproductive and could benefit from the implementation of a WST (*i.e.*, WST use may prolong oil production)." ER 1417; *see* ER 1419 ("Alternative 4 may have economic effects associated with the decommissioning of wells that become unproductive in the absence of WST use"); ER 1228 ("Under Alternative 4, without the use of WSTs, production at some wells may be expected to decline sooner than under the proposed action, as reservoir pressures continue to decline with primary production"). In other words, given the advanced age of offshore wells on the Pacific OCS, operators will increasingly need to employ WSTs in the face of declining production.

These findings are supported by Intervenors' statements in this matter. *See* DCOR Br. at 17 (ability to use hydraulic fracturing "is a vital—potentially existential—element of their activities in the [Pacific OCS]"). In fact, DCOR

admits that it alone anticipates up to four hydraulic fracturing treatments per year on just a single platform. *Id.* at 55 n.12.

Interior's assumption regarding the "infrequent use" of WSTs on the Pacific OCS distorted its consideration of impacts and significance factors. In particular, Interior cited this infrequent use as a basis for its conclusions regarding accidents, induced seismicity, air quality, water quality, ecological resources, and fisheries. ER 1357, 1359, 1364, 1365, 1367-69, 1376, 1392, 1394, 1396, 1399, 1401, 1404-06. For example, in considering potential impacts from well casing failures, Interior claims that "given the past limited WST use on the [Pacific] OCS … , and the likely limited future application of fracturing WSTs, few if any wells may be expected to undergo sufficient repeated pressurization and depressurization events to affect well cement casing integrity." ER 1315. With regard to seismicity, Interior concludes that the Proposed Action is "not expected to result in any increase in seismicity of the [Pacific] OCS and adjacent coastal counties" due to "the expected very low frequency of WST use anticipated for the reasonably foreseeable future… ." ER 1365; *see also* ER 1369 (finding no noticeable impacts on air quality or climate change "[b]ased on the expected very low frequency of WST use anticipated for the reasonably foreseeable future"); ER 1399 (finding potential for fish and marine mammals to be exposed to WST-related chemicals in produced water, but concluding that such exposure "would occur infrequently and

would be localized and of short duration"). In the FONSI, Interior similarly cites the alleged infrequency of WSTs to support its conclusions. ER 1175, 1177.

Courts have rejected similar attempts by federal agencies to underestimate the frequency of WSTs in NEPA reviews. In *Center for Biological Diversity v. Bureau of Land Mgmt.*, 937 F. Supp. 2d 1140 (N.D. Cal. 2013), plaintiffs challenged an EA regarding four oil and gas leases on approximately 2,700 acres in Monterey and Fresno counties. Despite the growing use of hydraulic fracturing nationwide, BLM assumed for purposes of the EA that "no more than one exploratory well would be drilled in total on the land within the leases." *Id.* at 1148. The court found that "this projection fails to take into account all 'reasonably foreseeable' possibilities as required by NEPA," as evidenced by the record and the defendants' own acknowledgment "that fracking activity in the United States has increased dramatically in recent years." *Id.* at 1155-56. The court concluded that this assumption "unreasonably distort[ed] BLM's assessment of at least three of the 'intensity' factors in its FONSI." *Id.* at 1157-59.

The district court dismisses this decision based upon the same mischaracterizations of the record—the allegedly low number of offshore WSTs in the past and the "low potential for additional WSTs" due to geological composition—discussed above. ER 22. Yet in both cases, the federal agencies' improper assumption resulted in a failure "to take into account all 'reasonably

foreseeable' possibilities as required by NEPA." *Center for Biological Diversity*, 937 F. Supp. 2d at 1155-59. This failure, in turn, distorted consideration of impacts and significance factors, leading the agency to "erroneously analyze[ ] the potential effect of the leases on public health and safety" and "erroneously discount[ ] the uncertainty from fracking that may be resolved by further data collection." *Id.* at 1158-59.

In sum, as a result of Interior's reliance on the unfounded assumption of infrequent well stimulation use, it failed to take a "hard look" at the impacts of the Proposed Action, in violation of NEPA.

B. Interior Improperly Assumed that Permit Compliance Would Render Impacts Insignificant.

It is undisputed that WSTs on the Pacific OCS will involve the use of dozens of extremely toxic chemicals, including many known carcinogens, mutagens, reproductive toxins, developmental toxins, endocrine disruptors, or acute toxicity chemicals. ER 1372-75; ER 1392; *see* SER 336-52 (finding at least 28 F-graded hazardous chemicals used in acidization); SER 568-71 (finding at least 33 WST chemicals that are "hazardous to aquatic species"). Following completion of WSTs, waste fluids that return to the surface in "produced water" are disposed of either by reinjection into the well or by discharge into the ocean. ER 1348-51.

Interior admits that half of this produced water may be discharged into the ocean. ER 1364.

In the Final PEA, Interior assumed that compliance with a general permit issued under the federal Clean Water Act, 33 U.S.C. § 1251 *et seq.*, would render impacts related to the use of toxic chemicals insignificant. This permit, known as the National Pollution Discharge Elimination System General Permit CAG 280000" (the "NPDES General Permit"), was issued by EPA in 2014 to regulate discharges from offshore oil and gas exploration, development, and production facilities on the Pacific OCS. ER 1265; SER 573.

Without any evidence or analysis, Interior states that "[b]ecause permit limits are requirements, no effects on water quality from such discharges are expected beyond the 100-m[eter] mixing zone." ER 1370; *see* ER 1376-79, 1388. Interior then concludes that "[d]ue to the permit limits and monitoring, it is expected that marine life protected under such measures would be effectively protected from any adverse effects of WST constituents in permitted discharges." ER 1392; *see also* ER 1396-99 (same for impacts on marine coastal fish and marine mammals); ER 1402 (same for impacts on sea turtles); ER 1406 (same for impacts on fisheries).

However, Interior's reliance on this permit to support its conclusions is both arbitrary and unlawful. As an initial matter, an agency cannot excuse itself from conducting the required "hard look" under NEPA because an activity is conducted

pursuant to another permit or because impacts have been discussed in a "non-NEPA document." *See South Fork Band Council of Western Shoshone*, 588 F.3d at 726; *Klamath-Siskiyou Wildlands Ctr. v. Bureau of Land Mgmt.*, 387 F.3d 989, 998 (9th Cir. 2004) (rejecting as "without merit" arguments that an agency is excused from NEPA compliance where a "facility operates pursuant to a state permit").

The district court erroneously determined that this precedent is inapplicable by finding that "[h]ere, the agencies did perform their own analysis of whether the use of WSTs was likely to significantly impact water quality." ER 23 (citing ER 1265-75). However, Interior preformed no such analysis. The referenced pages describe requirements of the NPDES General Permit, sampling results from discharge monitoring reports ("DMRs") required by that Permit, or provide background about discharge sources.

More importantly, the whole effluent toxicity ("WET") testing required by the NPDES permit was not intended or designed to address discharges related to WSTs, and cannot be used to support Interior's findings, as the district court suggested. The NPDES General Permit was drafted at a time when EPA was unsure that such treatments were even occurring offshore, and the requirement to report the chemical formulation of discharges in DMRs was only added to the final version after concerns were raised by the California Legislature and others. *See*

SER 630-32. As Interior admits, there "is not enough information on the DMRs to identify WSTs." SER 143. WET testing is only required by the NPDES General Permit on a quarterly basis and is not connected to the use of well stimulation. SER 585-86; ER 1378. That frequency diminishes to an annual test after four consecutive WET tests indicate no observable effects. SER 585; ER 1377.

The district court's statement that "the NPDES Permit requires oil and grease sampling, as well as visual monitoring of free oil, in conjunction with every use of a WST" does nothing to address these concerns. ER 23 (citing ER 1378). While oil spills in the Pacific OCS are certainly a concern, the more immediate and recurrent impact related to WSTs is from the discharge of toxic chemicals. Yet the NPDES General Permit does not require monitoring for even the most common WST fluids. *Cf.* ER 1372 (Table 4-12), 1373 (Table 4-13), 1375 (Table 4-14) *with* SER 590-91, 618-23, 626-27. Even if such monitoring were required, toxicity data on many well stimulation fluids is lacking. *See* ER 1380 (noting lack of toxicity data on 31 chemicals); ER 1393 (noting lack of toxicological bioassay data); ER 1395 (same).

In sum, the NPDES General Permit serves different purposes that are wholly inadequate to address the potential environmental impacts of well stimulation, and cannot excuse Interior from the "hard look" required by NEPA.

C. Interior Improperly Assumed that Dilution of Toxic Chemicals Would Render Impacts Insignificant.

Interior also improperly assumed that the dilution of well stimulation chemicals and other waste fluids discharged in ocean waters would render any impacts insignificant, without any evidence or analysis to support this assertion. As stated in the Final PEA, "[b]ecause WST flowback fluids are mixed and diluted with much greater volumes of produced water, concentrations of WST fluids at platform discharge points would be low and would appear infrequently." ER 1374. Interior relies on dilution to conclude that the discharge of WST chemicals would have no significant impacts related to water quality or the marine environment. ER 1376, 1385-86, 1393, 1394, 1396-97, 1402, 1405.

However, the Final PEA lacks any direct evidence or analysis regarding the impacts of WST flowback fluids on the marine environment or how dilution would lessen any toxicity in such fluids. *See* 40 C.F.R. §§ 1500.1(b) ("information must be of high quality. Accurate scientific analysis, expert agency comments, and public scrutiny are essential to implementing NEPA."); 1502.24 ("Agencies shall insure the professional integrity, including scientific integrity, of the discussions and analyses" in NEPA documents). This assumption is particularly arbitrary given the lack of toxicity data for many chemicals. *See* ER 1380. Commenters on the draft PEA specifically recommended that Interior back up its assertions with

evidence. For example, EPA recommended that Interior provide "a quantitative assessment, including the expected dilution factors prior to discharge, to further evaluate impacts and to support the conclusion that water quality would not be adversely affected." SER 150. The Coastal Commission found that "the document relies on assumed low levels of uses and dilution" to support its findings, but failed to provide evidence to reach objective conclusions. SER 527.

The district court reasoned that the Final PEA "explains how it estimated dilution" and, in response to comments, "analyzed data collected from actual well treatment fluids used" offshore in 2014 and 2016. ER 24 (citing ER 1379-81). However, this mischaracterizes the record. As discussed above, the NPDES General Permit did not require Interior to conduct any actual water sampling at the time well stimulation occurs, and Interior made no efforts to actually obtain such information. The so-called "analysis" simply took data from three DMRs,[3] applied a dilution factor, and then attempted to calculate an estimated concentration of a few chemicals in produced water discharge. ER 1380-85.

[3] These DMRs involved WSTs for eight separate wells on platform Harmony over a seven month time period, further undercutting Interior's claim regarding the infrequency of WSTs.

In sum, Interior's unsupported reliance on dilution to reach conclusions regarding insignificant impacts violated NEPA. *See Native Ecosystems Council*, 418 F.3d at 964.

D. Interior Improperly Relied on the Lack of Information to Support Its Conclusions.

Finally, Interior improperly relied on the lack of information regarding the impacts of WSTs to conclude that there would be no significant impacts from the Proposed Action, rather than doing the necessary work to obtain such knowledge. *See Nat'l Parks & Conservation Ass'n*, 241 F.3d at 733 ("lack of knowledge does not excuse the preparation of an EIS; rather it requires the [agency] to do the necessary work to obtain it"); *Churchill Cty. v. Norton*, 276 F.3d 1060, 1072-73 (9th Cir. 2001) (NEPA favors "coherent and comprehensive up-front environmental analysis to ensure ... that the agency will not act on incomplete information, only to regret its decision after it is too late to correct.").

According to Interior, "there remains incomplete or unavailable information related to the activities contemplated in this programmatic analysis or gaps in science for particular resources or impacts." ER 1362. Yet Interior specifically relies on this lack of information to support its conclusions regarding the impacts of the Proposed Action. *See, e.g.*, ER 1365, 1367 (finding air quality and climate change impacts will be minor based on a lack of data); *see also* ER 1374, 1392

(finding no adverse effect on water quality even with lack of data on toxicity of many WST fluids).

In comments on the draft PEA, state and federal agencies urged Interior to provide additional information and analysis to address these uncertainties. As stated by the Coastal Commission, "[t]he PEA does not appreciably increase the knowledge base concerning the many unknowns and uncertainties surrounding WST use on the OCS .... It would be much more helpful for the document to focus on the unknowns and uncertainties, followed by concrete proposals for the development of the additional studies needed to reach objective conclusions regarding safe levels (if any) of use." SER 527; *see also* SER 531. EPA also recommended that Interior "provide additional analysis, include supporting documentation, and identify specific minimization or mitigation measures, as necessary, to support the finding of no significant impacts for this project." SER 150.

As this Court has stated, "general statements about 'possible effects' and 'some risk' do not constitute a 'hard look' absent a justification regarding why more definitive information could not be provided." *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1213 (9th Cir. 1998). Moreover, "[p]reparation [of an EIS] is mandated where uncertainty may be resolved by further collection of data, or where collection of such data may prevent speculation

on potential effects." *Center for Biological Diversity*, 937 F. Supp. 2d at 1159 (quoting *Native Ecosystems Council*, 418 F.3d at 1240); *see Sierra Club v. U.S. Forest Serv.*, 843 F.2d 1190, 1195 (9th Cir. 1988) ("The purpose of an EIS is to obviate the need for speculation by insuring that available data are gathered and analyzed prior to the implementation of the proposed action"); *see also* 40 C.F.R. § 1502.22(a) ("[i]f the incomplete information relevant to reasonably foreseeable significant adverse impacts is essential to a reasoned choice among alternatives and the overall costs of obtaining it are not exorbitant, the agency shall include the information in the environmental impact statement.").

The district court found that the Final PEA described the "exhaustive search" undertaken by Interior to discover such scientifically credible information, which it claims is all that NEPA requires. ER 24 (citing ER 1363). This conclusion is factually and legally incorrect. This single page of the Final PEA simply notes that "the exact component chemicals of WST fluids are not definitively known at this programmatic stage," and then improperly concludes that any impacts will be accounted for by the NPDES General Permit. Interior simply ignored comments by state and federal agencies to provide additional analysis and documentation to support their findings. *See* SER 150, 300, 527.

This Court recently addressed a similar situation in *Oregon Natural Desert Ass'n v. Rose*, 921 F.3d 1185 (9th Cir. 2019), which involved an EA governing a travel management plan for a wilderness area. As the Court concluded:

> The EA itself "contains virtually no references to any material in support of or in opposition to its conclusions," even though the EA "is where the [Bureau's] defense of its position must be found." *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1214 (9th Cir. 1998) (citing 40 C.F.R. § 1508.9(a)) .... We have warned that "general statements about 'possible' effects and 'some risk' do not constitute a 'hard look' absent a justification" for why an agency could not supply more "definitive information." *Id.* at 1213 (internal quotation marks omitted). The EA and the EIS lack any such justification.

Id. at 1191.

Similarly, here, Interior's reliance on a lack of information to support its conclusions fails to provide the "hard look" required by NEPA.

III. INTERIOR VIOLATED NEPA BY DEFINING THE STATEMENT OF PURPOSE AND NEED IN UNREASONABLY NARROW TERMS.

An agency tasked with preparing an EA must include a statement that "briefly specif[ies] the underlying purpose and need to which the agency is responding in proposing the alternatives including the proposed action." 40 C.F.R. § 1502.13. While an agency is granted discretion in this task, a statement of purpose and need "will fail if it unreasonably narrows the agency's consideration of alternatives so that the outcome is preordained." *Alaska Survival v. Surface Transp. Bd.*, 705 F.3d 1073, 1084 (9th Cir. 2013). Since "[t]he stated goal of a project necessarily

dictates the range of reasonable alternatives … an agency cannot define its objectives in unreasonably narrow terms." *City of Carmel-by-the-Sea v. U.S. Dep't of Transp.*, 123 F.3d 1142, 1155 (9th Cir. 1997). Stated another way, "[a]n agency may not define the objectives of its action in terms so unreasonably narrow that only one alternative from among the environmentally benign ones in the agency's power would accomplish the goals of the agency's action, and the EIS would become a foreordained formality." *Friends of Southeast's Future v. Morrison*, 153 F.3d 1059, 1066 (9th Cir. 1998) (quoting *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 196 (D.C. Cir. 1991)).

Moreover, "[w]here an action is taken pursuant to a specific statute, the statutory objectives of the project serve as a guide by which to determine the reasonableness of objectives outlined in an EIS." *Westlands Water Dist. v. U.S. Dep't of Interior*, 376 F.3d 853, 866 (9th Cir. 2004). In defining the project purpose and need, agencies "should always consider the views of Congress … in the agency's statutory authorization to act, as well as in other congressional directives." *Nat'l Parks & Conservation Ass'n v. Bureau of Land Mgmt.*, 606 F.3d 1058, 1070 (9th Cir. 2010) (quoting *Busey*, 938 F.2d at 199).

Here, the Final PEA's stated purpose and need is unduly narrow and, in effect, is the same as the Proposed Action. In particular, the stated "purpose of the proposed action (use of certain WSTs, such as hydraulic fracturing) is to enhance

the recovery of petroleum and gas from new and existing wells on the [Pacific] OCS, beyond that which could be recovered with conventional methods (i.e., without the use of WSTs)." ER 1217. "The need for the proposed action is the efficient recovery of oil and gas reserves from the [Pacific] OCS." *Id.* The Proposed Action itself (Alternative 1) is to "allow use" of offshore WSTs on the Pacific OCS. ER 1223. In effect, rather than providing a "purpose and need to which the agency is responding in proposing the alternatives including the proposed action," it provided such a statement only for the Proposed Action.

This unduly narrow purpose and need statement improperly constrained the consideration of reasonable alternatives because only the Proposed Action would meet these requirements. As EPA stated in its comments on the draft PEA, "[s]uch a narrow and prescriptive statement identifies a solution, rather than the underlying need, and may unduly constrain the range of alternatives that would be responsive to the underlying need." SER 153.

Nowhere does the purpose and need statement reflect the statutory requirements of the Outer Continental Shelf Lands Act ("OCSLA"), 43 U.S.C. § 1331 *et seq.*, which establishes a framework under which Interior may lease areas of the OCS for oil and gas development. OCSLA mandates that "environmental safeguards" be in place for offshore oil development and requires Interior "to balance orderly energy resource development with protection of the human,

marine, and coastal environments." 43 U.S.C. §§ 1332(3), 1802(2)(B). Instead, the statement only considers the purpose of increasing energy production from the Pacific OCS through the use of WSTs.

The district court found that it "was reasonable for [Interior] to frame the EA in terms of allowing WSTs given the settlement agreements" in the previous litigation. ER 31. However, nothing in the settlement agreements required such a result or otherwise permitted Interior to improperly constrain their review. In particular, the settlement agreements required Interior to prepare a PEA "to analyze the potential environmental impacts of well-stimulation practices on the Pacific OCS, including hydraulic fracturing and acid well stimulation." SER 557. Nowhere did the settlement define the statement of purpose and need for conducting this analysis. In effect, rather than a focus on "analyzing" the impacts of WSTs, the Final PEA instead focused on encouraging their use.

This Circuit has rejected such narrowly drawn statements of purpose and need. In *Nat'l Parks*, this Court considered a purpose and need statement in a NEPA review for a land exchange with BLM that would enable the development of a private landfill. 606 F.3d at 1062-63. The Court noted that while the statement included one BLM goal of meeting long-term landfill demand, it also set forth "three private objectives as defining characteristics of the proposed project" which "necessarily and unreasonably constrain[ed] the possible range of

alternatives." *Id.* at 1071-72. In particular, of the six alternatives considered, all but the no action alternative "would result in landfill development of some sort and would require some portion of the land exchange to occur." *Id.* at 1072. This "unreasonably narrow purpose and need statement" violated NEPA. *Id.*; *see also Backcountry Against Dumps v. Chu*, 215 F. Supp. 3d 966, 978-79 (S.D. Cal. 2015) (finding that purpose and need statement for electric transmission line project was "too narrowly drawn" because it "focused almost exclusively on private interests" and limited consideration of viable alternative).

Similarly, here, Interior's unreasonably narrow purpose and need statement violated NEPA.

IV. INTERIOR VIOLATED NEPA BY FAILING TO CONSIDER A REASONABLE RANGE OF ALTERNATIVES.

NEPA requires that federal agencies provide a "detailed statement" regarding the "alternatives to the proposed action." 42 U.S.C. § 4332(2)(C)(iii); *see* 40 C.F.R. §§ 1502.14(a); 1508.9(b). This requirement "lies at the heart of any NEPA analysis." *California ex rel. Lockyer v. U.S. Dep't of Agric.*, 459 F. Supp. 2d 874, 905 (N.D. Cal. 2006). Agencies should "[r]igorously explore and objectively evaluate all reasonable alternatives" that relate to the purposes of the project, and briefly discuss the reasons for eliminating any alternatives from detailed study. 40 C.F.R. § 1502.14. "The existence of a viable but unexamined alternative renders

an EA inadequate." *Western Watersheds Project v. Abbey*, 719 F.3d 1035, 1050 (9th Cir. 2013) (internal quotations and citations omitted).

In the Final PEA, Interior evaluated four alternatives: (1) Alternative 1: Proposed Action—Allow use of WSTs at 22 production platforms located on 43 leases on the Pacific OCS; (2) Alternative 2: Allow use of WSTs at the 22 production platforms, but only at depths greater than 2,000 feet below the seafloor surface; (3) Alternative 3: Allow use of WSTs at the 22 production platforms, but no open water discharge of WST waste fluids; and (4) Alternative 4: No Action—Allow no use of WSTs at the production platforms. ER 1223-30. Alternatives 2 and 3 were largely the same as Alternative 1. As Interior admitted, "Alternatives 1, 2, and 3 all include the use of the same four types of WST, and thus the nature and magnitude of any potential WST-related impacts will be relatively similar among these three alternatives." ER 1362; *see* ER 1419 ("Overall, there are relatively few differences among the action alternatives (or between fracturing and non-fracturing WSTs) regarding the nature and magnitude of the environmental effects"). The lack of any meaningful difference between the alternatives did not allow for informed decision-making or public participation in evaluating the impacts of WSTs on the Pacific OCS, contrary to the requirements of NEPA. *See Muckleshoot Indian Tribe v. U.S. Forest Serv.*, 177 F.3d 800, 813 (9th Cir. 1999)

(federal agency violated NEPA where two action alternatives considered were "virtually identical").

Moreover, Interior failed to consider other reasonable alternatives suggested by California and other commenters. These reasonable alternatives included:

- prohibiting the use of WSTs in specific locations or at particular times of the year (SER 527);
- requiring the disclosure of WST fluid constituents and additives (SER 299);
- requiring notice to state agencies and the public prior to conducting WSTs or waste discharges (SER 299); or
- limiting the number of WSTs in a given year (SER 322).

While the Final PEA considered but eliminated three additional alternatives, the reasonable alternatives suggested by commenters were not included or evaluated. ER 1230-33 (allowing WSTs with limits on injection pressures; allowing WSTs with limits on the volume of injected fluids; allowing WSTs but prohibiting certain chemicals). The Final PEA also failed to adequately explain why such alternatives were not reasonable. Rather, Interior erroneously claimed that "[t]here were no commenters who proposed that the PEA include a wider range of alternatives that also suggested an additional alternative for review that would lend itself to meaningful analysis." ER 1445.

The district court dismissed the alternatives suggested by California and others, erroneously finding that they "either were covered by the Final EA" or

"would be better addressed during a site-specific permitting inquiry." ER 32. There is no basis in the record to support these conclusions. With regard to the alternative requiring disclosure of WST fluids, the district court found that "[p]laintiffs do not explain how imposing such requirements would affect the impact of WSTs on the environment." *Id.* (citing *Westlands Water Dist.*, 376 F.3d at 868). This alternative, suggested by DOGGR, would have required Interior "to notify stakeholders within the region of influence prior to WST and/or discharge of waste WST fluids into open waters. Applicable State agencies may include the California Coastal Commission, State Lands Commission, and Department of Fish and Wildlife/Office of Spill Prevention and Response." SER 300. Nowhere in *Westlands* did this Court require such an explanation. In any event, it should be apparent that these state agencies would be better prepared to address any accidents or spills involving WSTs on the Pacific OCS with prior knowledge of when and where such activities were occurring.

In sum, Interior's failure to consider reasonable alternatives to the Proposed Action in the Final PEA was contrary to the requirements of NEPA.

V. THE DISTRICT COURT CORRECTLY HELD THAT THE COASTAL ZONE MANAGEMENT ACT REQUIRES INTERIOR TO PROVIDE A CONSISTENCY DETERMINATION FOR THE PROPOSED ACTION.

A. CZMA Background.

Congress enacted the CZMA to "preserve, protect, develop, and where possible, to restore or enhance, the resources of the Nation's coastal zone." 16 U.S.C. § 1452(1). To accomplish these objectives, the CZMA authorizes the Secretary of Commerce to review and approve coastal management programs submitted by the states. *See id.* §§ 1454, 1455. After the Secretary has approved a state's coastal management program, section 1456(c)(1)(A) of the CZMA directs that "[e]ach Federal agency activity within or outside the coastal zone that affects any land or water use or natural resource of the coastal zone shall be carried out in a manner which is consistent to the maximum extent practicable with the enforceable policies of" the state's program. *Id.* § 1456(c)(1)(A). For these federal agency activities, the federal agency "shall provide a consistency determination to the relevant State agency." *Id.* § 1456(c)(1)(C).

A "Federal agency activity" is subject to paragraph (c)(1) of section 1456 unless it is subject to paragraph (c)(2) or (c)(3). *Id.* § 1456(c)(1)(A). As discussed below, and as the district court found, only paragraph (c)(1) applies to the Proposed Action.

The National Oceanic and Atmospheric Administration promulgated regulations designed "to assure" that federal agency activities subject to 16 U.S.C. § 1456(c)(1) are consistent with state management programs to the maximum extent practicable. *See* 15 C.F.R. §§ 930.30, 930.32(a)(1). Under the regulations, if a federal agency plans to commence an activity with foreseeable coastal effects, the agency must determine whether the activity "will be undertaken in a manner" fully consistent "with the enforceable policies of approved management programs" unless prohibited by law applicable to the agency. *Id.* §§ 930.36(a), 930.32(a)(1), 930.33(a)(1). The federal agency must submit its "consistency determination" to the applicable state agency for review. *Id.* § 930.34. The state agency may concur, conditionally concur, or object to a consistency determination. *Id.* §§ 930.4(a), 930.41(a).

The California Coastal Act of 1976, California Public Resources Code section 30000 *et seq.*, is included in California's approved coastal management program under the CZMA. Cal. Pub. Res. Code § 30008; *Am. Petroleum Inst. v. Knecht*, 456 F. Supp. 889, 893-94 (C.D. Cal. 1978). The Coastal Commission is one of the State's designated coastal zone planning and management agencies and may exercise all powers authorized in the CZMA. Cal. Pub. Res. Code § 30330. "California's coastal zone includes coastal waters and adjacent shorelands, and

extends three miles seaward from the State's coast line." *California v. Norton*, 311 F.3d at 1167.

B. 16 U.S.C. Section 1456(c)(1) Requires a Consistency Determination for the Proposed Action.

As the district court properly held, 16 U.S.C. section 1456(c)(1) requires Interior to provide a determination to the Coastal Commission as to whether the Proposed Action is fully consistent with enforceable policies in the California Coastal Act. ER 48; *see* 16 U.S.C. § 1456(c)(1)(A); 15 C.F.R. § 930.36. Section 1456(c)(1) requires this consistency determination for four reasons: (1) the Proposed Action is a federal agency activity; (2) the Proposed Action has reasonably foreseeable effects on coastal uses and resources protected by the policies in the California Coastal Act; (3) paragraphs (c)(2) and (c)(3) of section 1456 do not apply; and (4) the legislative history and purpose of the CZMA supports the application of paragraph (c)(1) of section 1456.

1. The Proposed Action is a Federal Agency Activity.

The CZMA itself does not define "Federal agency activity," but the CZMA's implementing regulations include a broad definition of the term:

> The term 'Federal agency activity' means any functions performed by or on behalf of a Federal agency in the exercise of its statutory responsibilities. The term 'Federal agency activity' includes a range of activities where a Federal agency makes a proposal for action initiating an activity or series of activities when coastal effects are reasonably foreseeable, e.g., a Federal agency's proposal to physically alter coastal

> resources, a plan that is used to direct future agency actions, a proposed rulemaking that alters uses of the coastal zone. "Federal agency activity" does not include the issuance of a federal license or permit to an applicant or person (see subparts D and E of this part) or the granting of federal assistance to an applicant agency (see subpart F of this part).

15 C.F.R. § 930.31(a).

The Proposed Action falls within this broad definition. The Proposed Action, i.e., Interior's proposal to allow WSTs on 22 platforms in 43 lease areas in the Pacific OCS if applications for such use comply with certain performance standards, is a function performed by Interior while exercising its responsibilities under OCSLA. The Final PEA acknowledges as much, such as by identifying Interior's obligations under OCSLA as the authority for undertaking the Proposed Action. ER 1215 (observing that OCSLA "directs the Secretary of the Interior to establish policies and procedures that expedite exploration and development of the [OCS] for the production of resources (e.g., oil and natural gas) in a safe and environmentally sound manner"), 1218; *see, e.g.*, 43 U.S.C. §§ 1332(3), 1334, 1337(p)(4).

The Proposed Action even fits within the example given in 15 C.F.R. section 930.31(a) of what a "Federal agency activity" can include for purposes of the CZMA. Namely, the Proposed Action is a "proposal for action initiating an activity"—the activity being the use of WSTs on 22 platforms in 43 lease areas in

the Pacific OCS. 15 C.F.R. § 930.31(a). Even more, the Proposed Action falls within at least one of the examples given in the regulation of what a "proposal for action" can constitute, i.e., "a plan [or policy] that is used to direct future agency actions." *Id.* The Proposed Action, after all, lets the world know that Interior will, going forward, approve applications requesting the use of WSTs so long as such applications comply with certain performance standards.

The Proposed Action also falls within 15 C.F.R. section 930.31(a) because it has "reasonably foreseeable" coastal effects and does not include the issuance of a license or permit or the granting of federal assistance to an applicant agency. *See* 15 C.F.R. § 930.31(a). No party contends that the Proposed Action involves a grant of federal assistance to an applicant agency. The other factors are discussed in the sections below.

Interior, API, DCOR, and Exxon contend that the Proposed Action is not a "Federal agency activity" because, in their view, the Final PEA and FONSI were not prepared for a proposed action and because no decision to approve a proposed action has been made. Yet the Final PEA and FONSI specifically identify and discuss the Proposed Action to allow WSTs on the Pacific OCS. ER 1172-79. The definition of "Federal agency activity" in 15 C.F.R. section 930.31(a) includes a "proposal for action" and does not require the actual approval of the activity. The Proposed Action is, as its name states, a "proposal for action," and Interior has not

withdrawn it. Regardless, as discussed above in Argument I.A, Interior approved the Proposed Action through the FONSI, and any suggestion that Interior does not plan to consider and allow WST use (that is, implement the Proposed Action) or that such a plan is speculative belies the record, Interior's historical approvals of WSTs, and the interests and actions of industry participating in this litigation. *See* Argument I.A, *supra*.

According to DCOR, the Proposed Action is not a "Federal agency activity" because it is not a plan to allow WSTs on the Pacific OCS. DCOR Br. at 38-39. DCOR asserts that such a plan has been in place by the federal government since 1969. To support its argument, DCOR relies on an obsolete federal regulation from 1969, an EIS from 1974, and a letter from Interior in 2014 purporting to discuss the 1974 EIS. The latter two documents were not part of the record below and should be disregarded; the 1974 EIS is not even included in the excerpts of record in this appeal. *See Tonry v. Security Experts, Inc.*, 20 F.3d 967, 975 (9th Cir. 1994).

As for the 1969 regulation—30 C.F.R. section 250.36—it was superseded decades ago. The version of section 250.36 on the books in 1969 was entirely revised by at least 1979, and this subsequent version does not reference any WSTs. *See* 34 Fed. Reg. 13,544, 13,546 (Aug. 22, 1969); 44 Fed. Reg. 61,886, 61,900 (Oct. 26, 1979). Regardless, the Proposed Action is blatantly different than the

superseded 1969 regulation and expressly says it is to "Allow Use of WSTs." ER 1203-04, 1223-26.

Throughout their briefs, Interior, API, Exxon, and DCOR frequently characterize the Final PEA or FONSI as the "Federal agency activity." This characterization is incorrect. California's position is that the *Proposed Action* is the "Federal agency activity" under 16 U.S.C. section 1456(c)(1) for which a consistency determination is required. In other words, the Final PEA and the FONSI are not the "Federal agency activity," but the underlying activity (the Proposed Action) discussed in them is.

2. The Proposed Action Has Reasonably Foreseeable Coastal Effects.

The district court held that the Proposed Action has reasonably foreseeable effects on coastal uses and resources protected by enforceable policies in the California Coastal Act. *See* ER 2, 46. This holding is correct for at least three reasons. SER 526-39; DCOR ER 982-92.

First, it is reasonably foreseeable that the Proposed Action will affect marine resources, such as species of special biological significance, as well as the biological productivity and quality of coastal waters. *See* Cal. Pub. Res. Code §§ 30230-31. Under the Proposed Action, the use of WSTs at 22 production platforms in coastal waters will likely increase, and chemicals used in WSTs will

be discharged into coastal waters from at least 13 of the platforms. *See* Argument II.A, *supra*; ER 1228, 1351. The Proposed Action does not limit the amount of WST chemicals that can be discharged from the platforms, nor does it limit the amount or type of chemicals that may be used in WSTs in general. SER 134, 530. The Final PEA itself expresses concern about water quality and toxicity to organisms from WST chemicals. ER 1374, 1399. In fact, it is well-established that exposure to WST chemicals harms organisms. SER 336-52, 568-71. Even produced water that is highly-diluted can cause such harm. *See, e.g.*, SER 724, 726. The district court found there was no dispute that "the use of WSTs 'may affect' at least some listed species" under the ESA. ER 35.

Second, it is reasonably foreseeable that the Proposed Action will result in additional spills of hazardous substances in coastal waters from the 22 platforms, including during the transportation of chemicals to and from the platforms and during operations. *See* Cal. Pub. Res. Code § 30232. The Final PEA admits as much. ER 1354, 1356.

Third, the Proposed Action will likely affect the scenic and visual quality of the coast by extending the life of aging infrastructure at the 22 platforms and increasing the marine transport of chemicals and equipment to that infrastructure. *See* Argument II.A, *supra*; *see also* Cal. Pub. Res. Code § 30251.

Exxon contends that any coastal effects from the Proposed Action are speculative because, in its view, proposals by operators for plans or permits to use WSTs in the future are merely "possible." Exxon Br. at 37, 39. But this argument ignores the historical use of WSTs in the Pacific OCS, the predictions of WST use in the Final PEA, and the near-certain applications for WST use by operators. *See* Argument II.A, *supra*.

API argues that the Proposed Action must "directly affect" the coastal zone and that coastal effects from WSTs by operators in the future do not count. API Br. at 30. But Congress expressly abolished the "direct affects" test in 1990, and coastal effects from WSTs by operators in the future must be considered. *See* Argument V.B.4, *infra*; ER 1780-81; 15 C.F.R. §§ 930.11(g), 930.31(a), 930.33(a)(1), (d).

Although DCOR contests the first reason above regarding the Proposed Action's effects related to discharges, this is of no consequence. DCOR Br. at 43-44. The other two reasons separately and independently support the district court's conclusion.

DCOR's argument, in any event, is meritless. DCOR contends that the Coastal Commission believes that discharges from oil and gas activity on the Pacific OCS are too far away to affect the coastal zone. This contention is based solely on outdated and irrelevant statements by EPA from 1982 and 1983

regarding EPA's 1982 NPDES General Permit. That permit has long been superseded by subsequent permits. *See, e.g.*, ER 1485. The standard in the CZMA for determining effects to the coastal zone from federal agency activities has also broadened substantially since the early 1980s. *See* Argument V.B.4, *infra*. There is also no indication that the 1982 NPDES General Permit involved discharges of WSTs like those contemplated in the Proposed Action.[4]

DCOR further relies on EPA's 2014 NPDES General Permit and the Coastal Commission's concurrence to it under the CZMA, but neither document suggests that a particular distance of discharges related to WST activities away from the coastal zone would (or would not) affect the coastal zone. SER 573-721. Even if they did or could be construed as much, it would be irrelevant. As discussed above in Argument II.B, the NPDES General Permit is wholly inadequate to address the effects of WSTs. The permit also was issued several years before the Proposed Action was circulated, and the Coastal Commission's understanding of WSTs on the Pacific OCS and their effects changed in the interim. SER 530-31.

[4] Some of the distances and calculations in DCOR's brief also appear to be incorrect, or at least it is unclear how DCOR arrived at them. For instance, 1000 meters is 0.621 miles, not 0.57 miles.

3. The Proposed Action Is Not Subject to 16 U.S.C. Section 1456(c)(2) or (c)(3).

Paragraph (c)(1) of section 1456 only applies if paragraph (c)(2) or (c)(3) do not. 16 U.S.C. § 1456(c)(1)(A). No party contends that paragraph (c)(2) applies to the Proposed Action, but Interior, API, Exxon, and DCOR contend (c)(3) applies. The district court correctly rejected their argument.

Paragraph (c)(3) applies when there is an application for a federal license or permit; when a person submits a plan for exploration, development, or production for an area leased under OCSLA; or when a person applies for a federal license or permit for an activity purportedly described in such a plan. *See* 16 U.S.C. § 1456(c)(3)(A)-(B).

The Proposed Action does not fall under any of these categories. The Proposed Action also is not an action by a federal agency on any particular application or submission that might fall under any of these categories. For example, the Proposed Action is not an application by DCOR for a federal license or permit. Nor is the Proposed Action a submission by DCOR for a plan for exploration, development, or production for an area leased under OCSLA. Nor is it an application by DCOR for a federal license or permit for an activity purportedly described in such a plan. Nor is it an action by Interior on a specific application or submission by DCOR. Thus, paragraph (c)(3) does not apply.

Rather, as discussed above, the Proposed Action is a general plan or policy by Interior to allow WSTs on 22 platforms in 43 lease areas in the Pacific OCS if applications for such use comply with certain performance standards. Paragraph (c)(1) applies to review the Proposed Action, not (c)(3).

It is important to note that consistency review of the Proposed Action under (c)(1) is different than consistency review of permits and plans for WST use under (c)(3). Review of individual permits and plans for particular lease areas under (c)(3) would just assess the particular WST uses contemplated by those permits and plans, whereas review of the Proposed Action under (c)(1) will assess the broad effects of WST use in the Pacific OCS. Interior and industry apparently wish to prevent this broad review, but that is contrary to the CZMA and its regulations. *See* 16 U.S.C. § 1456(c)(1); 15 C.F.R. § 930.31(a), (c) ("The Federal agency activity category is a residual category for federal actions that are not covered under subparts D, E, or F of this part," where subpart E involves consistency review of OCS plans and license or permit activities described in those plans).

California v. Norton is instructive on this point. This Court held that consistency review of suspensions of thirty-six offshore oil leases was required under 16 U.S.C. section 1456(c)(1). 311 F.3d at 1173. In so holding, the Court found that "section (c)(3) review will be available to California at the appropriate

time for specific individual new and revised plans as they arise, and section (c)(1) review is available now for the broader effects implicated in suspending the leases." *Id.* at 1174. The court explained that "[t]his phasing of review fits closely the expressed intent of Congress in subjecting the analogously broad implications of lease sales to (c)(1) review and specific plans to (c)(3) review." *Id.* The court made clear that the "exploration plan and development and production plan stages are *not* the only opportunities for review afforded to States under the statutory scheme." *Id.* at 1173. Likewise here, (c)(1) review applies now to assess the broad impacts of WST use on the 22 platforms and 43 lease areas in the OCS—the Proposed Action—and (c)(3) review is available for individual plans and permits for WST use when they arise.

Interior, API, Exxon, and DCOR seek to limit the application of *California v. Norton* to lease suspensions or activities akin to lease sales. But *California v. Norton* follows the language and structure of 16 U.S.C. section 1456(c) in that federal agency activities, like the Proposed Action, which do not fall under the terms of paragraphs (c)(2) or (c)(3), and which do otherwise fall under the terms of paragraph (c)(1), are reviewable under (c)(1).

Interior relies on a sentence in Justice Stevens' dissent in *Secretary v. California*, 464 U.S. 312 (1984) which states that the "decision to lease" is the "*only* Federal activity that ever occurs with respect to oil and gas development" in

the OCS. *Id.* at 359. Whether or not this was a permissible construction of the CZMA in 1984, it certainly is not any more. Interior would have this Court overlook the amendments to (c)(1) in 1990 and their related legislative history, discussed in the following section, which make plain Congress's intent to broaden the activities constituting a "federal agency activity" under (c)(1). Justice Stevens' statement is not supported by the current language or structure of 16 U.S.C. section 1456(c).

API argues that the Proposed Action is "subsidiary" to exploration and development and production plans, and therefore is governed by (c)(3). API Br. at 39. Again, as discussed, (c)(3) does not apply because the Proposed Action is not an application for a permit or license, nor is it a submission by a person for a plan under OCSLA. Nor is it a federal action on such applications or submissions. The Proposed Action is an overarching plan by the federal government to allow WSTs. Like the suspensions of the thirty-six offshore oil leases in *California v. Norton*, there is nothing "subsidiary" about it to an operator's OCSLA exploration or development and production plan. *See California v. Norton,* 311 F.3d at 1172-73.

DCOR erroneously argues that the Coastal Commission has already concurred under the CZMA with the use of WSTs contemplated by the Proposed Action. DCOR Br. at 40. DCOR cites to a 2016 study by the California Council on Science and Technology regarding hydraulic fracturing in *state waters* to which

the CZMA does not apply, and the particular decisions (and restrictions) by state agencies regarding such activities are not before this Court. DCOR also references the Coastal Commission's 2013 concurrence with EPA's 2014 NPDES General Permit, but overlooks the substantial differences between the permit and the Proposed Action. For instance, the permit does not discuss particular discharges of WST-related chemicals contemplated by the Proposed Action. *See* SER 590-91, 618-23, 626-27. The NPDES General Permit was issued several years before the Proposed Action was circulated for public comment in 2016, and the Commission's understanding of WSTs on the Pacific OCS changed in the interim. SER 530-31. The permit is also focused on effects from discharges, whereas the Proposed Action implicates additional coastal effects, such as those resulting from spills and effects on the scenic quality of the coast.

Not only has there not been review under (c)(1) of the Proposed Action, but there appears to have never been consistency review under (c)(3) of any WST use contemplated by the Proposed Action. The exploration and development and production plans in the administrative record for the Pacific OCS platforms do not contemplate the use of WSTs as described in the Proposed Action. *See* AR 52223-52264; 52296-61787. There certainly has not been (c)(3) review for WST use for approximately half of the Pacific OCS platforms because their plans pre-date the Coastal Commission's federal consistency authority. SER 536.

4. The Legislative History and Purpose of 16 U.S.C. Section 1456(c)(1) Confirms Its Application to the Proposed Action.

In 1990, Congress substantially expanded the scope of federal agency activities subject to consistency review under 16 U.S.C. section 1456(c)(1). *See* Coastal Zone Management Act of 1972, Pub. L. No. 92-583, § 307(c)(1), 86 Stat. 1280, 1285 (1972); Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, sec. 6208, § 307(c)(1), 104 Stat. 1388 (1990). The amendments to section 1456(c)(1) remain in effect today. According to the legislative history of the 1990 amendments, Congress intended the new, expanded test in (c)(1) to include OCS lease sales and any other federal agency activities that fell within the terms of the paragraph. *See* H.R. Rep. No. 101-964 at 968, 970-71 (Conf. Rep. 1990); 136 Cong. Rec. H8068, H8072-73, 75-76 (daily ed. September 26, 1990) (statement of Representative Jones); ER 1780-81.

This legislative history from 1990 confirms the application of (c)(1) to the Proposed Action. As discussed above, the Proposed Action falls under the plain terms of (c)(1), and therefore the Proposed Action is subject to consistency review under it.

API observes that a Senate Report discussing the 1990 amendments stated the new test in (c)(1) was not intended to "include activities such as multi-year development plans." API Br. at 11, n.4; ER 1781. The Senate Report reasoned

that whether development would occur under the plans was too uncertain. ER 1781. Here, the Proposed Action is not a "multi-year development plan," and there is no doubt that operators will seek to use WSTs, as they have used WSTs in the past and stated their intent to do so in the future. *See* Argument II.A, *supra*.

Interior and API rely heavily on the legislative history of CZMA amendments from the 1970s to support their construction of (c)(1). California disagrees with their interpretation of this legislative history, which is the subject of much debate. *See Secretary*, 464 U.S. at 321-30, 347-55. Regardless, the value, if any, of the statements from this history for purposes of determining the scope of (c)(1) has been undermined by the subsequent expansion of the scope of (c)(1) in 1990.

Interior and API argue that the application of (c)(1) to the Proposed Action is inconsistent with the purposes of the CZMA. But their arguments ignore the language of section 1456(c) itself and the legislative history of the 1990 amendments, as discussed above. Their arguments also ignore many of the findings and policies set forth by Congress in the CZMA, notably those related to protecting coastal uses and resources and the importance of involving states in managing development along their coastlines. *See* 16 U.S.C. §§ 1451(b)-(g), (i), (m), 1452(1), (4). These policies support the application of (c)(1) to the Proposed Action. Such application will allow the Coastal Commission to review the Proposed Action, and the Commission's comments will hopefully increase the

likelihood that the Proposed Action will conform to policies in the California Coastal Act to the maximum extent practicable.

Upholding the district court's decision will not, as Interior contends, give California veto power over OCSLA plans and permits proposed by operators or slow consistency review of them. Interior overlooks that California seeks review of the Proposed Action under 16 U.S.C. section 1456(c)(1) and is not seeking review of OCSLA plans or permits subject to 16 U.S.C. section 1456(c)(3). Interior also overlooks the multiple options available to a federal agency if a state objects to a federal agency's (c)(1) consistency review. *See* 15 C.F.R. §§ 930.43(d), 930.44.

VI. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN ISSUING AN INJUNCTION ON CALIFORNIA'S CZMA CLAIM OR IN DENYING DCOR'S MOTION FOR RECONSIDERATION.

The district court's issuance of the injunction on California's CZMA claim and denial of DCOR's motion for reconsideration of the judgment were both well within the court's discretion.[5] First, the district court applied the appropriate

[5] A Rule 59(e) motion to "alter or amend a judgment" is an "extraordinary remedy, to be used sparingly in the interests of finality and conservation of judicial resources." *Kona Enters., Inc. v. Estate of Bishop*, 229 F.3d 877, 890 (9th Cir. 2000). While district courts possess broad discretion to evaluate Rule 59(e) motions, the court should only grant such a motion if it "'is presented with newly discovered evidence, committed clear error, or if there is an intervening change in the controlling law.'" *McDowell v. Calderon*, 197 F.3d 1253, 1255-56 (9th Cir.

standards in issuing a permanent injunction and did not excuse California from satisfying these standards. Second, DCOR's alleged financial harm is self-inflicted and speculative, and did not provide any basis for the district court to reconsider its judgment. Third, even considering this financial injury, the district court properly balanced the harms and concluded that an injunction was appropriate.

A. The District Court Applied the Appropriate Legal Standards for Issuance of a Permanent Injunction.

After ruling for California and the Conservation Group Plaintiffs on the merits of their CZMA and ESA claims, the district court applied the appropriate legal standards and properly exercised its discretion in issuing a permanent injunction. In particular, the Court considered the four-part test for permanent injunctive relief, discussed each factor, and properly concluded that the balance of harms and the public interest warranted such relief. ER 41-44, 49; ER 2. The district court specifically requested that the parties address such relief at the November 5, 2018 hearing on cross-motions for summary judgment, and each party was given an opportunity to provide its position. *See* ER 51-76.

In doing so, the district court did not excuse California from meeting its burden to show that injunctive relief was appropriate. *See* DCOR Br. at 45-46. As

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1999) (en banc) (quoting *389 Orange St. Partners v. Arnold*, 179 F.3d 656, 665 (9th Cir. 1999)).

the district court noted, "Plaintiffs were clearly seeking injunctive relief, both in their complaints and in their motions for summary judgment," and addressed such relief at the summary judgment hearing. ER 2-4. There is simply no merit to DCOR's argument that California waived its right to a permanent injunction by not fully briefing the issue in its opening brief. In fact, as the district court noted, DCOR itself failed to address these issues in its briefing or at the hearing, and its motion for reconsideration could be denied on that basis alone. ER 3-4.

The cases cited by DCOR do not warrant a different result. *See* DCOR Br. at 49-50. In *Winter v. Natural Resources Defense Council*, 555 U.S. 7 (2008), the Supreme Court held that enjoining the Navy's sonar training activities was not warranted because "the possible harm to the ecological, scientific, and recreational interests" of the plaintiffs was outweighed by the "national security" concerns raised by the Navy. *Id.* at 24-26. The Supreme Court found that the Ninth Circuit had not given proper consideration or sufficient weight to the Navy's concerns regarding the impact of an injunction on its training activities. *Id.* at 26-34. Here, there are no such national security issues. Moreover, DCOR cannot show that the district court erred by failing to consider information that was never presented in its briefing or hearing on cross-motions for summary judgment, or was introduced for the first time as part of its motion for reconsideration.

Similarly, in *Weinberger v. Romero-Barcelo*, 456 U.S. 305 (1982), the Supreme Court overturned an injunction granted by the Third Circuit prohibiting the Navy from conducting weapons training until it complied with the Clean Water Act because the lower court had failed to balance the equities. *Id.* at 310-20. And in *Amoco Production Co. v. Village of Gambell*, 480 U.S. 531 (1987), the Supreme Court found that the Ninth Circuit had improperly presumed that injunctive relief should be granted for violations of environmental statutes, without undertaking the proper analysis. *Id.* at 540-46. No such legal errors occurred here. As discussed below, the district court did not refuse to balance the equities or conclude that environmental interests always supersede all other interests.

B. The District Court Did Not Abuse its Discretion in Applying the Injunction Factors and Balancing the Equities.

There is no merit to DCOR's argument that the district court abused its discretion by failing to give proper consideration to the potential financial harm to DCOR from an injunction. DCOR Br. at 51-55. In the proceedings below, DCOR asserted that Interior's inability to process two permits to use hydraulic fracturing on Platform Gilda, one submitted in December 2016 and the second on January 10, 2019 (the same day that DCOR filed its motion for reconsideration), would result in millions of dollars in financial harm. *Id.* at 5-7, 13-15. However, the district

court did not abuse its discretion in rejecting this argument, for several reasons. ER 4-6.

First, this alleged harm is of DCOR's own making and is not irreparable. ER 5-6. With regard to the permit submitted by DCOR in December 2016, Interior explained by letter dated January 19, 2017 that "the proposed activities have not been previously described in the existing DCOR Santa Clara Field [development and production plans ("DPPs")]. Therefore, DCOR must supplement the Santa Clara Field approved DPP for Platform Gilda to include the activities proposed in the [permit]." ER 1170. Interior confirmed that this remains the situation in its opening brief. Interior Br. at 10.[6]

DCOR does not appear to have taken any action during the past three years to comply with this request. As the district court found, "the fact that DCOR has not yet even submitted the DPP raises the possibility that its proposed operations on Platform Gilda will not be ripe for approval—because of its own inaction—until after this Court's injunction has already expired." ER 6. Consequently, any alleged harm resulting from Interior's failure to approve this permit is of DCOR's own making and is not irreparable. *See* 11A Wright, Kane, Miller & Marcus,

[6] While DCOR claims that it is "exempt" from supplementing its DPP under Section 25(i) of OCSLA, DCOR Br. at 18, 59, this dispute between DCOR and Interior was not a legal issue addressed below and provides no basis for finding that the district court abused its discretion.

Federal Practice and Procedure § 2948.1 (2d ed. 2011) ("Not surprisingly, a party may not satisfy the irreparable harm requirement if the harm complained of is self-inflicted."); *Doster, Inc. v. Internet Corp.*, 296 F. Supp. 2d 1159, 1163 (C.D. Cal. 2003) (same). The second permit submitted by DCOR on January 10, 2019, which requests authorization to conduct the same WST on the same platform, warrants the same response.

Second, the district court did not err in finding that the financial harm alleged by DCOR is highly speculative and thus not sufficient to constitute irreparable harm. ER 5; *see In re Excel Innovations, Inc.*, 502 F.3d 1086, 1098 (9th Cir. 2007) ("Speculative injury cannot be the basis for a finding of irreparable harm"). In particular, this harm improperly assumes that DCOR will be forced to cease operations on these oil wells for several years, and ultimately to prematurely abandon operations on Platform Gilda. DCOR Br. at 55-56. Yet the injunction issued by the district court only prohibits Interior from approving such permits until it completes certain legal obligations under the ESA and CZMA, which could occur in a matter of months once the appropriate information is submitted to the relevant agency. *See, e.g.*, 15 C.F.R. § 930.41 (for CZMA consistency process, requiring state agency response "within 60 days from receipt of the Federal agency's consistency determination and supporting information"). Thus, the

district court's injunction is unlikely to result in the abandonment of operations on Platform Gilda or cause the harm alleged by DCOR.

Moreover, any temporary loss of income could ultimately be recovered when the permits are approved and thus is not irreparable. *See California Pharmacists Association v. Maxwell-Jolly*, 563 F.3d 847, 851 (9th Cir. 2009) ("Typically, monetary harm does not constitute irreparable harm."); *Sampson v. Murray*, 415 U.S. 61, 90 (1974) ("[I]t seems clear that the temporary loss of income, ultimately to be recovered, does not usually constitute irreparable injury"). DCOR's reliance on *FTC v. Lab. Corp. of Am.*, 2011 WL 3100372 (C.D. Cal. Mar. 11, 2011) is unhelpful as that case involved a different standard for injunctive relief under Section 13(b) of the FTC Act, and discussed unrecoverable harm that occurred between the entry of a preliminary injunction and a final decision on the merits, which is not the situation here. *See id.* at *15, 22.

Even considering this financial harm, the district court did not abuse its discretion in finding that the balance of harms favored the issuance of an injunction. ER 5-6. First, Interior's violations have resulted in irreparable injury to California, and such injuries cannot be remedied by money damages. As the U.S. Supreme Court has stated, "Environmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, i.e., irreparable." *Amoco Prod. Co.*, 480 U.S. at 545. The district

court properly determined that Interior's legal violations would result in irreparable harm if WST permits were approved before the environmentally protective requirements of the ESA or CZMA were followed. ER 42-43, 49; ER 5; *see Cottonwood Envtl. Law Ctr.*, 789 F.3d at 1091 (reaffirming that the harm flowing from a procedural violation can be irreparable); *California v. Norton*, 311 F.3d at 1169, 1178 (affirming injunction setting aside federal agency activity until the agency submitted a consistency determination to California under the CZMA);[7] *see also* Argument II.A-D, V.B.2, *supra*.

Exxon observes that the district court found that Interior reasonably concluded the Proposed Action would have no significant environmental impacts under NEPA. According to Exxon, the district court's finding shows that California will not be irreparably harmed pending Interior's compliance with the CZMA. Exxon is incorrect for two reasons. First, the district's court's NEPA finding is erroneous. *See* Argument II, *supra.* Second, even if this finding were

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[7] The fact that hydraulic fracturing has previously occurred in state waters is irrelevant, and any approvals (and restrictions) by state agencies with respect to those activities are not before this Court. DCOR's citation to documents and reliance on supposed facts outside of the record should also be rejected. *See* DCOR Br. at 15, 54 (citing DCOR ER 1031-33); *Tonry*, 20 F.3d at 974 (declining to consider documents improperly included in excerpts of record and noting violation of "basic tenet of appellate jurisprudence"). The district court has ruled that Interior failed to comply with the ESA and CZMA prior to allowing WSTs in federal waters. DCOR has no right to simply charge ahead with business as usual or claim that such activities would be harmless.

correct, Exxon overlooks that the effects analysis for NEPA and the CZMA are different. NEPA concerns general environmental effects, whereas the CZMA concerns effects on coastal uses and resources. *See* 15 C.F.R. §§ 930.11(b), (g), 930.33(a)(1), 930.37. As the district court properly found, the Proposed Action's effects on California's coastal uses and resources are reasonably foreseeable, and such uses and resources will be irreparably injured if WSTs are allowed before Interior complies with the CZMA. *See* ER 2, 46, 49; Argument V.B.2, *supra*.

The district court did not err in finding that the balance of equities favors the issuance of an injunction. ER 43, 49; ER 4-6. As the Supreme Court and the Ninth Circuit have long determined, when environmental injury is sufficiently likely, "the balance of harms will usually favor the issuance of an injunction to protect the environment." *Amoco Prod. Co.*, 480 U.S. at 545; *see Cal. ex rel. Lockyer*, 575 F.3d at 1020; *League of Wilderness Defenders/Blue Mountains Biodiversity Project v. Connaughton*, 752 F.3d 755, 766 (9th Cir. 2014) (holding that "plaintiffs' irreparable environmental injuries outweigh the temporary delay intervenors face in receiving a part of the economic benefits of the project"); *Earth Island Inst. v. U.S. Forest Serv.*, 442 F.3d 1147, 1177 (9th Cir. 2006), *cert. denied*, 549 U.S. 1278 (2007) (economic loss suffered as a result of enjoined timber sales does not outweigh potential irreparable environmental harm and the public's interest in preserving the environment); *National Parks & Conservation Ass'n*, 241

F.3d at 738 (economic harm to defendant-intervenor "does not outweigh the potential irreparable damage to the environment"). In fact, under the ESA, the balance of hardships "always tips sharply in favor of endangered or threatened species." *Marbled Murrelet v. Babbitt*, 83 F.3d 1068, 1073 (9th Cir. 1996); *see also TVA v. Hill*, 437 U.S. 153, 187–88 (1978) (concluding that Congress determined in the ESA that the value of endangered species is "incalculable" and prohibiting the balancing of economic harms against the Congressionally determined public interest in preserving endangered species).

Finally, the public interest favors the issuance of an injunction. This Court has recognized "the well-established public interest in preserving nature and avoiding irreparable environmental injury." *Alliance for Wild Rockies v. Cottrell*, 622 F.3d 1045, 1056 (9th Cir. 2010); *see Earth Island Institute*, 442 F.3d at 1177 (the preservation of the environment, as required by federal environmental laws, "is clearly in the public interest"). As district court found, "the public interest is served by an order ensuring the government complies with" the ESA and the CZMA, and because "any interest in proceeding forward with WSTs is outweighed by the interest of the people of the state of California in ensuring that their representatives are afforded their statutory right to review the proposed action for consistency with California's coastal management plan." ER 43, 49. DCOR has

failed to show any abuse of discretion in the district court's consideration of this factor.

In sum, the district court did not abuse its discretion in issuing an injunction on California's CZMA claim or denying DCOR's motion for reconsideration.

CONCLUSION

California respectfully requests that this Court reverse the district court's judgment on California's NEPA claims and order Interior to prepare an EIS to address the significant impacts of the Proposed Action. California also respectfully requests that the Court affirm the district court's judgment and injunction on California's CZMA claim.

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STATEMENT OF RELATED CASES

Counsel is aware of no related cases within the meaning of Circuit Rule 28-2.6.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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